Team No. 4

C.A. No. 18-2010
C.A. No. 400-2010

IN THE UNITED STATES
COURT OF APPEALS FOR THE TWELFTH CIRCUIT

CITIZEN ADVOCATES FOR REGULATION AND THE ENVIRONMENT, INC.,
Appellant - Cross-Appellee,

v.

LISA JACKSON, ADMINISTRATOR,
United States Environmental Protection Agency,
Appellee - Cross-Appellant,

v.

STATE OF NEW UNION,
Intervenor - Appellee - Cross-Appellant

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW UNION

Brief for CITIZEN ADVOCATES FOR REGULATION AND THE ENVIRONMENT, INC., Appellant - Cross-Appellee

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JURISDICTIONAL STATEMENT

Appellant Citizen Advocates for Regulation and the Environment, Inc. ("CARE") filed a Complaint in the United States District Court for the District of New Union under the citizen suit provision of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6992(k), § 6972(a)(2) (2006). CARE also alleges that the district court had subject-matter jurisdiction pursuant to 28 U.S.C. § 1331 (2006) over their claim under § 553(e) of the Administrative Procedure Act ("APA"), 5 U.S.C. § 551-559 (2006).

This appeal is from a Final Judgment entered by the district court on September 29, 2010, dismissing all of CARE's claims for lack of subject-matter jurisdiction. (Order at 9). Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1291 (2006).

STATEMENT OF THE ISSUES

I. Whether RCRA § 7002(a)(2) provides jurisdiction for district courts to order the EPA to take action on CARE's petition filed pursuant to RCRA § 7004.

II. Whether 28 U.S.C. § 1331 provides jurisdiction for district courts to order the EPA to take action on CARE's petition filed under 5 U.S.C. § 553(e).

III. Whether the EPA's failure to act on CARE's petition constituted a constructive denial of that petition and a constructive grant of authorization of New Union's existing program, subject to judicial review under RCRA § 7006(b)(2).

IV. Whether this Court should lift the stay in C.A. No. 18-2010 and proceed with judicial review of EPA's constructive actions.

V. Whether the EPA must withdraw its approval of New Union's program because its resources and performance fail to meet RCRA's state-authorization criteria.

VI. Whether the EPA must withdraw its approval of New Union's program because the New Union 2000 Environmental Regulatory Adjustment Act is inconsistent under RCRA.

VII. Whether the EPA must withdraw its approval of New Union's program because the New Union 2000 Environmental Regulatory Adjustment Act renders the program not equivalent to the federal program, inconsistent with the federal program, or in violation of the Commerce Clause.

STATEMENT OF THE CASE

This is an appeal from a final Order of the District Court for the District of New Union denying CARE's motion for summary judgment. (Order at 9). CARE petitioned the Administrator of the United States Environmental Protection Agency ("EPA") under § 7004 of RCRA, 42 U.S.C. § 6974 (2006), and § 553(e) of the APA, 5 U.S.C. § 553(e) (2006), to commence withdrawal proceedings of New Union's hazardous waste regulatory program operating in lieu of the federal program under RCRA § 3006(b). (Order at 4). CARE supported the petition by reporting several facts occurring after EPA's grant of approval that changed New Union's program and asserted that New Union's program now stood contrary to EPA's approval criteria. *Id*. The EPA took no action on CARE's petition. *Id.*

CARE instituted an action seeking an injunction under § 7002(a)(2) of RCRA requiring EPA to act on CARE's petition. *Id.* New Union filed a motion under Fed. R. Civ. P. 24 to intervene on this action, which the district court granted. *Id.* The parties filed cross-motions for summary judgment, agreeing that the facts were uncontested. *Id.* The district court ultimately denied CARE relief by granting New Union's motion for summary judgment, finding a lack of subject-matter jurisdiction based on the characterization of EPA's approval or disproval as an order rather than a rule. (Order at 7-9).

Simultaneous to the filing of CARE's district court action, CARE filed a petition for judicial review under RCRA § 7006(b)(2) in this Court. (Order at 4-5). Specifically, CARE sought review of the EPA's constructive grant of approval of New Union's existing hazardous waste regulatory program. (Order at 5). New Union filed a motion under Fed. R. Civ. P. 24 to intervene in this action as well, which this Court granted. *Id.* EPA moved to stay this proceeding pending the outcome of the action in district court. *Id.* The Court granted this

unopposed motion and stayed the action. *Id.* CARE presently seeks to lift the stay and proceed with judicial review. (Order at 1).

STATEMENT OF THE FACTS

RCRA provides a comprehensive federal program for hazardous waste disposal that permits states to administer their own program as long as the state meets RCRA authorization standards. *See* 42 U.S.C. § 6926(b) (2006). In 1986, New Union sought and was granted authorization under RCRA § 3006 to administer its own program through its Department of Environmental Protection ("DEP"), as the state met all statutory and regulatory requirements issued by Congress and the EPA, respectively. (Order at 5). In order to meet these requirements, New Union assured the EPA that the state had adequate resources to administer and enforce the program by issuing timely permits, inspecting RCRA-regulated facilities biannually, and sufficiently punishing all significant violations. (Order at 10). Among these assurances, New Union noted it had at least fifty full-time employees to monitor 1,200 RCRA-permitted hazardous waste treatment, storage, and disposal facilities ("TSDs"). *Id.*

In the last decade amidst a financial crisis, New Union has depleted its RCRA program resources while continuously issuing permits to more than 300 additional TSDs, even though approximately 900 of the state's facilities currently operate with expired permits. (Order at 10-11). Although increasing permitted facilities, the state has reduced program personnel to thirty full-time employees from the fifty employed when the program was approved. (Order at 10). Further, the state's assurances that it would inspect *all* facilities at least every other year has resulted in the state inspecting only 10% of the facilities annually with the EPA inspecting an additional 10%. (Order at 11). Finally, New Union prosecuted only six of the twenty-two significant permit violations in 2009, and the EPA did the same. *Id.*

In 2000, New Union passed the 2000 Environmental Regulatory Adjustment Act ("ERAA") which significantly amended two pieces of legislation with important environmental consequences. *Id.* First, the ERAA amended the Railroad Regulation Act ("RRA") by removing all environmental responsibilities concerning intrastate railroad facilities from the state's RCRA program and vesting that authority in the independently run New Union Railroad Commission ("Commission"). (Order at 12). The amendment removed all permitting, inspection, and enforcement authority previously held by the DEP and eliminated all criminal sanctions for violations of environmental statutes. *Id.* Second, the ERAA amended the state's RCRA program by effectively prohibiting the treatment, storage, or transportation of Pollutant X within the state. *Id.* The amendment proscribes any current TSD from treating Pollutant X, prohibits the DEP from issuing permits for new facilities that would treat Pollutant X, and restricts the transportation of Pollutant X through the state. *Id.* Instead, all Pollutant X is to be sent out of state. *Id.*

STANDARD OF REVIEW

Appellate courts use the *de novo* standard when reviewing a district court's denial of summary judgment. *PCI Transp. Inc. v. Fort Worth & W. R.R. Co.*, 418 F.3d 535, 540 (5th Cir. 2005). Summary judgment is only appropriate if "there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2). Therefore, this Court has jurisdiction to hear and decide whether CARE was entitled to jurisdiction under RCRA and 28 U.S.C. § 1331, and whether the EPA should be ordered to withdraw its approval of New Union's hazardous waste regulatory program.

SUMMARY OF THE ARGUMENT

The district court erred in holding that RCRA § 7002(a)(2) does not provide district courts with jurisdiction to order EPA to act on CARE's properly filed petition under RCRA § 7004. CARE correctly submitted their petition under RCRA § 7004 since EPA's grant of approval of New Union's hazardous waste program was a rule and not an order. In addition to the grant of approval meeting the conditions of a rule under 5 U.S.C. § 551(4) (2006), EPA is entitled to *Chevron* deference on its interpretation of RCRA § 7004 deeming that such a grant of approval constitutes a rule. Since the Administrator failed to perform a mandatory duty required by RCRA § 7004, RCRA § 7002(a)(2) grants jurisdiction to district courts to hear this citizen suit filed against EPA.

Jurisdiction is proper under 28 U.S.C. § 1331, and the district court erred by holding to the contrary. CARE properly filed their petition under 5 U.S.C. § 553(e) seeking withdrawal of EPA's authorization of New Union's hazardous waste program. EPA's grant of authorization to New Union's program is a rule under 5 U.S.C. § 551(4), and as such, CARE must be given the right to petition for the repeal of that rule under 5 U.S.C. § 553(e). The APA is a federal law, CARE is seeking repeal of an agency rule under that law, and therefore 28 U.S.C. § 1331 provides jurisdiction in the district courts.

Judicial review is also available in this Court under 42 U.S.C. § 6976(b)(2) (2006) for the Administrator's grant of authorization of New Union's existing program. The EPA's failure to act within a reasonable time on CARE's petition was tantamount to a denial of the petition. This denial had the effect of a grant of authorization of New Union's existing hazardous waste program. The plain language of RCRA § 7006(b)(2) specifically grants jurisdiction to the Court of Appeals to review this authorization. This congressional intent, along with traditional notions

of judicial economy, favors lifting the stay of the proceedings currently before this Court and proceeding with judicial review of EPA's improper grant of authorization of New Union's program as it existed at the time of the petition.

Upon examining New Union's program, it is clear that the EPA must withdraw its approval. The program — particularly the permitting, inspection, and enforcement aspects — fall well below established RCRA minimum standards. Congress used mandatory language to explicitly state that when a program falls below these minimum standards the EPA *must* withdraw its authorization. Further, New Union's attempts to amend their environmental statutes are inconsistent under the Hazardous Material Transportation Act and are preempted by that statute. Removing rail hazardous waste facilities and restricting the transportation of Pollutant X violates a list of federal regulations promulgated by the EPA. Finally, New Union's proscription of most Pollutant X transportation and all Pollutant X treatment, storage, and disposal prohibits the free flow of interstate commerce and therefore violates the Commerce Clause.

ARGUMENT

I. RCRA § 7002(A)(2) PROVIDED JURISDICTION WITHIN THE DISTRICT COURT FOR THE DISTRICT OF NEW UNION TO ORDER THE ADMINISTRATOR TO TAKE ACTION PURSUANT TO CARE'S PROPERLY FILED PETITION UNDER RCRA § 7004.

CARE properly filed a petition under RCRA § 7004, which clearly states that "any person may petition the Administrator for the . . . repeal of any regulation under this chapter." 42 U.S.C. § 6974(a) (2006). CARE correctly petitioned the Administrator to repeal the rule permitting New Union to operate the state hazardous waste program in violation of the state's permit. Under RCRA § 7004(a), the Administrator has a mandatory duty to act on the petition. *Id.* Since the Administrator failed to perform a nondiscretionary duty, RCRA § 7002(a)(2) clearly allowed CARE to bring its citizen suit "in the district court for the district in which

the . . . violation occurred." 42 U.S.C. § 6972(a)(2) (2006). Since the violation occurred in New Union, jurisdiction was proper in the District Court of New Union.

A. CARE's petition was correctly submitted under RCRA § 7004 since the EPA's approval of New Union's hazardous waste program was a rule and not an order.

RCRA § 7004(a) clearly states that "[a]ny person may petition the Administrator for the . . . repeal of any regulation under this chapter." 42 U.S.C. § 6974(a). CARE petitioned the EPA to repeal the rule/regulation permitting New Union to operate the state hazardous waste program outside of its permit. When statutory language is unambiguous, it should be interpreted by its ordinary and common meaning. *Holster v. Gatco, Inc.*, 130 S.Ct. 1575, 1577 (2010). The ordinary meaning of regulation is "a *rule or order*, having legal force, usually issued by an administrative agency." *Black's Law Dictionary* 1398 (9th ed. 2009) (emphasis added).

Since RCRA provides no definition for what constitutes a rule or an order, the EPA must look to the APA, the controlling act for all agencies, for the definition of a rule. Under the APA, a rule is "the whole or part of an agency statement of general or particular applicability and future effect designed to implement . . . law or policy . . . and includes the approval . . . for the future . . . practices . . . ." 5 U.S.C. § 551(4). In *Iacaboni v. United States*, the district court held that the definition of a rule does not require the agency's statement to be "formally designated as a rule or regulation to fall within the APA framework." 251 F. Supp. 2d 1015, 1039 (D. Mass. 2003). Therefore, the EPA does not have to formally assert that its statement is a rule for the statement to be covered by the APA rule framework.

1. The EPA's inaction on New Union's program constitutes an agency statement.

The EPA stated its approval for the program through silence. The Administrator has a mandatory duty to respond in writing to CARE's petition, among other actions, but the

Administrator did not. 40 C.F.R. § 271.23(b)(1) (2010). The Administrator's inaction for almost one year is a statement from the EPA that is "tantamount to approval of [New Union's] decision[]." *Scott v. City of Hammond*, 741 F.2d 992, 998 (7th Cir. 1984). Here, New Union violated its EPA approved state hazardous waste program. The EPA's silence and inaction was the agency's statement approving New Union's program.

In *Balsam v. Department of Health and Rehabilitative Services*, the court determined that a moratorium on receiving certificate-of-need applications was not a rule. 452 So. 2d 976 (Fl. Dist. Ct. App. 1984). In its analysis, the court explained that an agency statement is a rule if it creates particular rights and adversely affects others. *Id*. at 977-78. The EPA's statement accepting New Union's permit violations created a right for New Union and other similarly situated states to ignore and actively violate their permits. Additionally, the EPA's statement adversely affected others since it allowed for the increase in the number of hazardous TSDs while decreasing the number of employees dedicated to the program. (Order at 10). New Union's program not only violates EPA's grant of authorization for the program, but it also stands repugnant to the objectives of RCRA. In particular, EPA's statement allows for "hazardous waste management practices . . . which [do not] protect[] human health and the environment. 42 U.S.C. § 6902(a)(4) (2006). Clearly, the EPA's statement adversely affects others and is therefore a rule.

2. Even if this Court rejects the *Balsam* court's definition of a rule, the EPA's statement is still a rule under the definition provided by § 551(4) of the APA.

In order for the EPA's statement to be a rule, the statement must be of "general or particular applicability and future effect designed to implement . . . law or policy . . . and include[] the approval . . . for the future . . . practices . . . ." 5 U.S.C. § 551(4). The EPA's

statement applies generally to all approved state programs because the statement asserts that EPA inaction on a petition is tantamount to a grant of authorization for programs that fall below approval requirements. However, the APA's definition of rule also allows for particular applicability. 5 U.S.C. § 551(4). It is well established that where there is a specific rule, such a rule governs over the general. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 524 (1989). Regardless of whether the EPA's statement applies generally to all states or specifically to New Union, it still meets the requirements for a rule.

The EPA's statement also has future effect on the law or policy of state permit programs. By allowing New Union to continue violating its EPA-approved state program, the EPA is stating a new rule that it will allow such violations to persist in the future. Conduct that the agency intends to follow in the future clearly has a future effect on the law or policy of state permit programs. *Waste Mgmt., Inc. v. EPA*, 669 F. Supp. 536, 539 (D. Ct. D.C. 1987). In addition to the future effect on law or policy, the EPA's statement approves future practices of not only New Union's program, but also of any state program that has undergone changes inconsistent with the approval requirements.

The district court erred in holding that the EPA's approval of New Union's program was an order. Orders are retroactive in applicability. *PBW Stock Exch. v. SEC*, 485 F.2d 718, 732 (3d Cir. 1973). Since the New Union legislature recently passed new laws concerning the program, the implications of EPA's grant of authorization affect facts and situations yet to occur. The EPA's approval of New Union's hazardous waste program is a rule under the definition provided by the APA in § 551(4).

B. The EPA's determination that its approval of New Union's hazardous waste program was a rule is entitled to *Chevron* deference.

Having established that EPA's inaction, or constructive action, is a rule under the APA, "the choice [to] proceed[] by general rule . . . is one that lies primarily in the informed discretion of the administrative agency." *British Caledonian Airways, Ltd. v. C.A.B.*, 584 F.2d 982, 993 (D.C. Cir. 1978) (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947)). Since this choice is one within the agency's discretion, the EPA's determination that its approval of New Union's program is a rule is entitled to deference under *Chevron U.S.A., Inc. v. Natural Res. Def. Counsel*, 467 U.S. 837 (1984).

Contrary to the district court's holding, the EPA is not interpreting the definition of a rule under the APA by stating that its approval of New Union's program is a rule. (Order at 6). The EPA is interpreting RCRA § 7004(a), a statute clearly administered by the EPA. The EPA is interpreting § 7004(a) to declare that the EPA's approval of New Union's program constitutes a rule, and this rule can be promulgated, amended, or repealed by the Administrator. This interpretation by EPA is clearly allowed *Chevron* deference.

Chevron employs a two-step process to determine whether an agency's interpretation of a statute is valid. The first step is to determine whether the statutory language is ambiguous. *Nat'l Cable & Telecomms. Ass'n. v. Brand X Internet Servs.*, 545 U.S. 967, 986 (2005). If the language is unambiguous, then the Court simply applies the plain meaning of the statute regardless of the agency's interpretation. *Id*. However, if the statutory language is ambiguous, as is the term *rule* in § 7004(a), the Court must determine if the agency's interpretation is reasonable. *Id*. If the agency's interpretation is reasonable, the Court must accept that interpretation despite the court's interpretation differing from the agency's interpretation. *Id*.

Since it has been established that the rule referenced in § 7004(a) is ambiguous, this Court should move to step two and hold that EPA's interpretation was reasonable. The record is devoid of any evidence showing why EPA's approval of New Union's program was considered a rule by the agency. However, as long at the agency can adequately explain why it interpreted its approval to be a rule, the Court must apply *Chevron* deference. *Nat'l Cable*, 545 U.S. 967 at 981. This high level of deference is appropriate because the purpose of *Chevron* is to leave the interpretation of statutory ambiguities to the expertise of the implementing agency. *Id*.

The district court erred in holding that the EPA interpreted the APA's definition of rule under 5 U.S.C. § 551(4). The EPA rightly interpreted a statute under its authority - RCRA § 7004(a). Since the EPA interpreted RCRA, the agency is entitled to great deference under *Chevron*, and the Court should uphold the EPA's decision that its approval of New Union's program was a rule.

C. RCRA § 7002(a)(2) grants jurisdiction for district courts to hear citizen suits filed against the EPA because the Administrator failed to perform the mandatory duty required by RCRA § 7004.

The Administrator failed to perform her mandatory duty to act on CARE's petition as required by RCRA § 7004, which states the Administrator, "within a reasonable time . . . *shall* take action." 42 U.S.C. § 6974(a) (emphasis added). The well-held statutory interpretation cannon of *noscitur a sociis* states that a word "gathers meaning from the words around it." *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Oregon*, 515 U.S. 687, 702 (1995). Within the same section of RCRA the word *may* is used; if Congress wanted to use the word *may*, a discretionary term, it would have done so. *See* 42 U.S.C. § 6974(a) ("Any person *may* petition the Administrator . . .") (emphasis added); *Neuwirth v. La. State Bd. of Dentistry*, 845 F.2d 553,

557 (5th Cir. 1988) (holding that using "may" in place of "shall" affords discretion on the agency enforcing the statute).

When "may" and "shall" are used within the same statutory section, the ordinary meaning of the words is applied so that the former is permissive and the latter mandatory. *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d 930, 935 (9th Cir. 2006) (quoting *Haynes v. United States*, 891 F.2d 235, 239-40 (9th Cir. 1989). Congress specifically chose to use *shall* to describe the Administrator's duty to act on the petition. While the district court asserted that *shall* does not necessarily require mandatory action, this assertion is easily refuted. (Order at 6). The Supreme Court has stated that Congress's use of the mandatory word "shall" imposes a nondiscretionary obligation. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 661 (2007) (citing *Lopez v. Davis*, 531 U.S. 230, 241 (2001)).

1. The Administrator failed to perform her mandatory duty to act on CARE's petition.

The Administrator had a mandatory duty to act on the petition filed by CARE. The language used throughout § 7002 and § 7004 includes both *may* and *shall*. It is therefore understood that the Legislature could have made the Administrator's action on a petition discretionary by simply using the word *may* in place of *shall*. However, the legislature specifically chose *shall* to indicate the mandatory duty required by the Administrator to act on the petition.

Although the EPA may assert that they are within the reasonable time requirement to respond to the petition in RCRA § 7004(a), the year between the date the petition was submitted and the date that CARE filed an action in the district court is unreasonable due to the horrific and blatant violations of New Union's program. A one-year abstention from statutorily mandated

action is an acceptance of New Union's program as it exists today despite the litany of violations the state is committing.

2. The district court had jurisdiction under RCRA § 7002(a)(2) to hear CARE's citizen suit against the EPA.

RCRA § 7002(a) states that "[t]he district court shall have jurisdiction . . . to order the Administrator to perform the act or duty . . . ." 42 U.S.C. § 6972(a) (2006). The EPA or New Union may assert that for citizen suits brought under § 7002(a)(2) the actions "may be brought in the district court in which the alleged violation occurred or in the District Court of the District of Columbia." *Id.* The permissive *may* language is used as opposed to *shall* so that the party bringing the action can have a choice of forums. However, both choices are district courts, and therefore the actions are to be brought before federal courts.

II. JURISDICTION WAS PROPER UNDER 28 U.S.C. § 1331 IN THE DISTRICT COURT TO ORDER THE EPA TO ACT ON CARE'S PROPERLY FILED PETITION UNDER 5 U.S.C. § 553(E) TO WITHDRAW EPA'S AUTHORIZATION OF NEW UNION'S HAZARDOUS WASTE PROGRAM.

Pursuant to § 553(e) of the APA, every agency, including the EPA, *must* give an interested party the right to bring a petition for the repeal of a rule. 5 U.S.C. § 553(e) (emphasis added). CARE properly submitted their petition under 5 U.S.C. § 553(e) since the EPA's inaction toward New Union's state hazardous waste program was a rule, as discussed above, under 5 U.S.C. § 551(4). Because the jurisdictional question arises under the APA, a federal law, jurisdiction is proper in the district court under 28 U.S.C. § 1331.

A. Since the EPA's approval of New Union's program was a rule under 5 U.S.C. § 551(4), CARE must be given the right to petition for the repeal of that rule under 5 U.S.C. § 553(e).

Section 553(e) of the APA states that "[e]ach agency *shall* give an interested person the right to petition for the . . . repeal of a rule. 5 U.S.C. § 553(e) (emphasis added). As noted

above, EPA's inaction on CARE's petition was a rule under the APA, and therefore CARE's petition to repeal that rule is proper under § 553(e). As with RCRA, the APA uses both *shall* and *may* within its text. While *may* is not used in another subsection within § 553, *may* is used several times in addition to *shall* in § 552 concerning public information. 5 U.S.C. § 552 (2006). The same analysis of *shall* used above pertains to the word's use in § 553(e). *National Ass'n of Home Builders* states that *shall* requires a mandatory nondiscretionary obligation. 551 U.S. at 661. CARE has clearly met all the requirements under § 553(e), and therefore its petition was properly filed under § 553(e).

B. Because 5 U.S.C. § 553(e) is a federal law, the district court had jurisdiction under 28 U.S.C. § 1331 to hear CARE's properly filed petition for the repeal of an agency rule.

The APA does not grant jurisdiction itself, but when combined with 28 U.S.C. § 1331, jurisdiction is sufficient ". . . over a challenge to federal agency action." *Huang v. Mukasey*, No. C07-132RAJ, 2008 WL 418048, at *2 (W.D. Wash. Feb. 12, 2008). Since the EPA, a federal agency, has violated a mandatory provision of the APA, federal courts have jurisdiction. *Reiner v. W. Village Assocs.*, 768 F.2d 31, 33 (2d Cir. 1985), *see Califano v. Sanders*, 430 U.S. 99, 105 (1977). As *Saini v. U.S. Citizenship and Immigration Services* held, ". . . the APA vests the Court with jurisdiction to 'compel agency action unlawfully withheld or unreasonably delayed.'" 553 F. Supp. 2d 1170, 1175 (E.D. Cal. 2008) (quoting 5 U.S.C. § 706(1)). The district court erred in granting New Union's motion for summary judgment. CARE is clearly allowed to petition the EPA for repeal of an agency rule under 5 U.S.C. § 553(e). CARE's petition rightly found jurisdiction before the district court under 28 U.S.C. § 1331 since 5 U.S.C. § 553(e), a federal law, demands that the EPA give CARE the right to petition.

III. THE EPA'S FAILURE TO ACT WITHIN A REASONABLE TIME ON CARE'S PETITION WAS EQUIVALENT TO A DENIAL OF THE PETITION AND ULTIMATELY A GRANT OF AUTHORIZATION OF NEW UNION'S EXISTING PROGRAM, THE LATTER OF WHICH IS REVIEWABLE UNDER RCRA § 7006(b).

CARE's petition to withdraw authorization of New Union's existing program under RCRA § 7004 created a duty for EPA to take action on the petition "within a reasonable time following receipt of such petition." 42. U.S.C. § 6974(a). The APA defines "agency action" as "the whole or a part of an agency rule, order, license, sanction, relief or the equivalent or denial thereof, or *failure to act*." 5. U.S.C. § 551(13) (2006) (emphasis added). The EPA's inaction in this instance squarely fits the APA's definition of "agency action" and should be treated as such.

A. The EPA's failure to act on CARE's petition should be classified as a denial of the petition.

In *Environmental Defense Fund, Inc. v. Hardin,* the D.C. Circuit examined circumstances under which there may be a judicial remedy for the failure of an administrative agency to act promptly. 428 F.2d 1093, 1095 (D.C. Cir. 1970). The court reviewed the failure of the Secretary of the Department of Agriculture to take action with respect to a petition seeking cancellation of registration for the pesticide, DDT. *Id*. at 1096. The Federal Insecticide, Fungicide, and Rodenticide Act required that pesticides shipped in interstate commerce bear labels that included warnings necessary to prevent injury to people. *Id.* at 1095. The Secretary was to refuse or cancel the registration of pesticides failing to comply with this requirement. *Id.* The Environmental Defense Fund filed a petition with the Secretary requesting that notices of cancellation be issued for all poisons containing DDT and the suspension of registration for all such products pending outcome of the proceedings. *Id.* at 1096. The Secretary issued notices of cancellation for four uses of DDT but took no action on the request for interim suspension. *Id.* The Secretary contended that partial compliance on the petition rendered the petitioners claim

unripe because the Secretary had neither granted nor denied the requested relief. *Id.* at 1098. The court held that, "when administrative inaction has precisely the same impact on the rights of the parties as denial of relief, an agency cannot preclude judicial review by casting its decision in the form of inaction rather than in the form of an order denying relief." *Id.* The Secretary's inaction with regard to the request for interim suspension of the registration of DDT was tantamount to an order denying suspension. *Id.*

It is uncontested that the EPA took no action on CARE's petition to commence withdrawal proceedings. However, the Administrator *must* respond in writing to petitions. 40 CFR § 271.23(b)(1) (2010). The Administrator has taken no action since CARE submitted its petition, issuing a *de facto* denial of CARE's petition. The EPA did not commence withdrawal proceedings, and New Union's existing program continues to operate in lieu of federal regulations.

B. The EPA's denial of CARE's petition was tantamount to a grant of authorization of New Union's existing program, making it subject to judicial review.

In *U.S. Brewers Association, Inc. v. EPA,* the D.C. Circuit found that the EPA Administrator's refusal to repeal his regulation was, for jurisdictional purposes, *not only equivalent to its promulgation* but also reviewable because of this equivalency. 600 F.2d 974, 978 (D.C. Cir. 1979) (emphasis added). The Brewers Association petitioned the EPA pursuant to § 7004 of RCRA, requesting repeal of guidelines issued for beverage containers. *Id.* The denial of the petition to repeal the regulations was held to be equivalent to a promulgation of the regulations, rendering that action subject to judicial review. *Id.*

The Court of International Trade echoed this sentiment in *Associacao Dos Industriais de Cordoaria e Redes v. U.S.,* where a group of importers brought an action against the Department

of Commerce and the International Trade Commission, among others, seeking mandamus against the agencies ordering them to terminate antidumping investigations and enjoining them from filing antidumping petitions for one year. 828 F. Supp. 978, 981 (Ct. Int'l Trade 1993). The Department of Commerce argued that the importers did not have standing because the agency had not issued a final decision and therefore had not acted. *Id.* The court held that, specifically when administrative inaction has the same impact on the parties as a denial of relief, agency inaction may be tantamount to a final action. *Id*. The court further stated that "[the Department of] Commerce's position precludes review in circumstances where review would be most needed, in the face of administrative recalcitrance." *Id.*

Similarly, the EPA should not be allowed to evade judicial review by simply ignoring petitions. The EPA was not deciding whether or not to take action. The agency has taken *no action* at all. As a result, citizens of New Union are subjected to the EPA's tacit approval of New Union's existing program, which is inconsistent with and not equivalent to federal regulations under RCRA. This is a situation where judicial review is most needed, as the EPA's apparent intention is to continue approving this steadily declining state program. In failing to take action on CARE's petition, and effectively denying it, the EPA has constructively granted authorization of New Union's existing state program.

C. The presumption of unreviewability of agency inaction does not apply.

There is tension between the classification of agency inaction as action for purposes of review and the presumption of unreviewability of agency inaction articulated by the Supreme Court in *Heckler v. Chaney*, 470 U.S. 821 (1985). In *Chaney*, prison inmates sentenced to death by lethal injection petitioned the Food and Drug Administration ("FDA") for enforcement of the Federal Food, Drug, and Cosmetic Act, arguing that the drugs to be used in their execution were

not approved for such use, and therefore violated the Act. *Id.* at 823-24. In response to the FDA's denial of their petition, the inmates brought a claim under § 701(a)(2) of the APA in federal court seeking enforcement actions on the claim. *Id.* The Court found that it lacked subject-matter jurisdiction to review the claim because an agency's decision not to take enforcement action is presumed immune from judicial review. *Id.* at 832. The Court stated that unreviewable agency inaction isn't suited for review where the statute in question was deemed absolutely committed to the agency's judgment. *Id.* at 831. Justice Rehnquist reasoned that an abuse of discretion analysis would prove futile without judicially manageable standards against which a court could judge an agency's exercise of discretion. *Id* at 832. Where Congress provides guidelines for an agency to follow, particularly in its exercise of enforcement powers within the substantive statute, agencies are not free to disregard legislative direction in the statutory scheme that they administer. *Id.* at 832-33. Available guidelines, or "law to apply," is evidence of Congressional intent to circumscribe traditional agency enforcement discretion and should be treated as such. *Id.* at 834-35.

Justice Marshall, concurring in *Chaney*, stated that the "'presumption of unreviewability' [was] fundamentally at odds with rule-of-law principles firmly embedded in our jurisprudence," and hoped that this presumption would be limited to the facts of that case. *Id.* at 840. Justice Marshall stated, "discretion can be a veil for laziness, corruption, incompetency, lack of will, or other motives, and for that reason the presence of discretion should not bar a court from considering a claim of . . . arbitrary use of discretion." *Id.* at 847 (internal citations omitted). A large, firmly entrenched body of lower-court jurisprudence refutes the majority's reliance on the "tradition" of unreviewability suggested in *Chaney*. *Id.* at 850. Additionally, these cases recognize that:

> attempting to draw a line for the purposes of judicial review between affirmative exercises of coercive agency power and negative agency refusals to act is simply untenable; one of the very purposes fueling the birth of administrative agencies was the reality that governmental refusal to act could have just as devastating an effect upon life, liberty, and the pursuit of happiness as coercive governmental action. As Justice Frankfurter . . . wrote for this Court, "any distinction, as such, between 'negative' and 'affirmative' orders, as a touchstone of jurisdiction to review [agency action] serves no useful purpose."

Id. at 850-51 (quoting *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 143 (1939)).

The EPA's regulations provide guidelines that the agency must follow in determining whether there is sufficient cause to initiate withdrawal proceedings under RCRA. These guidelines are set forth in 40 C.F.R. §§ 271.4 (consistency), 271.9-14 (equivalency of state program), and 271.22 (criteria for withdrawal of State programs) (2010). The focus need not be centered on the inaction by the EPA, but rather on the effects of that inaction as well as the congressional intent for the agency to exercise its enforcement power under RCRA. The EPA's inaction was agency action having the effect of granting authorization to New Union's existing program, review of which is proper under 42 U.S.C. § 6976(b)(2).

IV. BECAUSE JURISDICTION IS PROPER UNDER 42 U.S.C. § 6976(b)(2), THE COURT OF APPEALS SHOULD LIFT THE STAY AND PROCEED WITH JUDICIAL REVIEW OF EPA'S CONSTRUCTIVE GRANT OF AUTHORIZATION.

The United States Courts of Appeals are inferior courts, created by Congress's Article III powers, and only have the jurisdiction that Congress confers upon it by statute. 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3901 (1976). The statutory basis for this Court's direct review of the EPA's action in this case can be found in 42 U.S.C. § 6976(b)(2).

RCRA § 7006(b) provides for "review of the Administrator's action . . . in granting, denying, or withdrawing authorization . . . under section 6926 of this title . . . in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides . . . upon application by such person." 42 U.S.C. § 6976(b)(2). Congress explicitly vested the Court

of Appeals with subject-matter jurisdiction over these claims. Although review in the District Court is proper under 42 U.S.C. § 6976 for the EPA's failure to take action on CARE's petition, that failure had the effect of a grant of authorization of New Union's program, and is reviewable in this Court. Public policy favors lifting the stay in the action currently before this Court and proceeding with judicial review of the EPA's constructive grant of authorization.

A. Congressional intent favors review of the Administrator's grant of authorization of a State program in the Court of Appeals.

The plain language of § 6976(b)(2) explicitly provides for appellate review of the Administrator's grant of authorization under 42 U.S.C. § 6926(b) in the Court of Appeals. 42 U.S.C. § 6976(b) (2006). Section 6976(b) concludes, "such review shall be in accordance with sections 701 through 706 of Title 5 of the APA." *Id.*

Looking to the APA for additional support and clarification, § 701(b)(2) references § 551(13) of the Act for the definition of specific terms. 5 U.S.C. § 701(b)(2) (2006). As previously addressed, "agency action" is defined in this section as inclusive of failure to act. 5 U.S.C. § 551(13). Therefore under the APA, it is fair to read the Court of Appeals's grant of jurisdiction under section 6976(b)(2) as, "review of the Administrator's *failure to act* in granting, denying, or withdrawing authorization . . . under section 6926 of this title."

The APA's support of CARE's position does not end with § 701. Section 703 sets out the form and venue for judicial review. 5 U.S.C. § 703 (2006). In pertinent part, § 703 states, "the form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court *specified by statute*." *Id.* Additionally, § 704, describing the types of actions reviewable, states that, "[a]gency action *made reviewable by statute* and final agency action for which there is no other adequate remedy in a court *are subject to judicial review.*" 5 U.S.C. § 704 (2006) (emphasis added). These relevant sections of the APA again direct the

court to the grant of subject-matter jurisdiction contained in § 6976(b)(2). Full effect must be given to the clear congressional intent to grant jurisdiction over these types of actions to the Courts of Appeals. To hold otherwise would render this section of RCRA meaningless.

B. Judicial economy also favors review of the Administrator's grant of authorization of a state program in the Court of Appeals.

A careful consideration of the effect of the other alternative before the Court, remanding to the District Court, provides further support for lifting the stay and proceeding in this Court. The injunctive relief offered by the district court ordering the EPA to act on CARE's petition, i.e., exhaustion of administrative remedies, is an inadequate means of relief. Requiring the exhaustion of administrative remedies articulated by the Supreme Court in *Woodford v. Ngo* unnecessarily complicates this judicial review. *Woodford v. Ngo,* 548 U.S. 81, 85 (2006).

Assuming this action is remanded to the district court, and the EPA is required to take action on CARE's petition, the result would require the EPA to formalize a determination it already made — denial of the petition. This creates a redundancy in the judicial review, weighing heavily against established public policy favoring judicial economy. By not acting, the EPA made its determination and granted authorization of New Union's program as it existed. Requiring the EPA to make this determination formal explicitly adds an unnecessary step in the judicial review of the EPA's grant of authorization. After the district court required the EPA to formalize its decision, this Court would be the eventual audience of CARE's cause of action for review. CARE would be asking this Court to review the EPA's arbitrary and capricious grant of authorization of New Union's program at the time of CARE's petition. Meanwhile, the continuing approval of New Union's program would result in irreparable harm disproportionate to the public benefit from requiring that there be strict compliance with this procedure. Model State Administrative Procedure Act (1981) § 5-103 (providing an exception to the requirement

that there be exhaustion of administrative remedy prior to review).

It makes little sense to remand to the district court, considering Congress intended to give this Court the authority to review actions by the Administrator in granting, denying, or withdrawing state authorization. If, in enacting RCRA, Congress intended that as a matter of national policy, hazardous wastes were to be comprehensively regulated, it strains credulity to assert that Congress meant for the EPA to stand passively aside while New Union flagrantly violates its statutory mandates. Absent compliance with the regulatory framework, hazardous waste will continue to be disposed of in manners that result in significant, and sometimes irreversible, damage to the environment. Both the congressional intent of RCRA and judicial economy heavily favor that the Court lift the stay and review the EPA's grant of authorization of New Union's program.

V. NEW UNION'S RESOURCES AND PERFORMANCE DO NOT MEET STATE-AUTHORIZATION STANDARDS; THEREFORE, EPA MUST WITHDRAW APPROVAL BECAUSE CONGRESS EXPLICITLY LIMITED THE AGENCY'S DISCRETION AND *CHANEY*'S PRESUMPTION DOES NOT APPLY.

Although the critical issue before the Court is the EPA's mandatory duty to withdraw authorization, New Union's inability to meet RCRA authorization criteria must first be established. To maintain state authorization, RCRA requires three conditions be met. First, the state program must be equivalent to the federal program. 42 U.S.C. § 6926(b). In other words, a state program must at least meet the minimum standards the federal program establishes. 4 William H. Rodgers, Jr., *Rodger's Envtl. L.* § 7:22 (2010). Second, a state's program must be consistent with the federal or state programs in other states. 42 U.S.C. § 6926(b). Third, the state's program must provide adequate enforcement to comply with these requirements. *Id.* Parts VI and VII look at New Union's failure to comply with the consistency requirement. This

Part addresses the program's failure to satisfy the equivalency and enforcement standards established in RCRA § 3006(b), and why this failure mandates withdrawal.

A. New Union's hazardous waste program has fallen well below the equivalency and enforcement standards necessary for state authorization.

The EPA established the basic minimum requirements for the federal program throughout Part 271 of the Code of Federal Regulations entitled "Requirements for Authorization of State Hazardous Waste Programs." According to the documents provided by New Union to the EPA, the state has failed to implement even the basic requirements necessary to meet these minimum standards. The DEP's 2009 Annual Report shows that, currently, at least 60% of New Union's 1500 TSDs operate with an expired permit. (Order at 11). New Union further concedes that under the state's policy of granting approximately 50 of its 125 annual permits to new or permitted facilities seeking expansion, only 75 permits are left to address the 900 facilities operating without a current permit. *Id.* Thinking optimistically, and assuming the 900 figure remains static, it would take New Union at least 12 years to bring its permitting program into federal RCRA compliance. Of course, this optimism is tempered by the Governor's likely termination of up to 10% of the DEP's current employees administering the program. (Order at 10-11). In light of this, it seems almost unnecessary to point out that § 271.13 requires New Union to prohibit operation of TSDs without a permit. 40 C.F.R. § 271.13 (2010). New Union's permitting program did not meet the minimum standards at the time of CARE's petition, and it is unlikely that it will do so in the near future.

Unfortunately, New Union's inspection and investigation resources fall even shorter of the federal minimum standard than the state is permitting program. The EPA's regulations unequivocally require a state to have adequate inspection and investigation resources to monitor the state program. 40 C.F.R. § 271.15(a), (b) (2010). In this light, the EPA approved New

Union's hazardous waste program nearly 25 years ago with the assurance that New Union had the resources to "inspect[] RCRA regulated facilities *at least* every other year." (Order at 11) (emphasis added). Instead of inspecting all facilities every other year, New Union currently has only enough resources to inspect 20% of the facilities in this timeframe. *Id*. Even after soliciting the EPA's assistance, the state can inspect 40% at most. *Id*. Worse yet, the decrease in DEP inspectors from 15 to seven since 1986 is likely to worsen because of personnel cuts to programs in which federal employees can perform state employees' functions. (Order at 10).

Finally, DEP's proven inability to prosecute even one-third of the significant permit violations — much less the hundreds of "minor" violations — demonstrates New Union's complete inability to implement the enforcement standards necessary to ensure compliance. (Order at 11). Once again, the EPA's regulations leave no doubt as to the state's expected enforcement authority. A state must have remedies available to "restrain immediately and effectively" all facilities not in compliance with their permits or endangering the public and environment. 40 C.F.R. § 271.16 (2010). Clearly, the 12 enforcement actions taken last year by the state and the EPA fall noticeably short of restraining the 900 facilities that are subject to this regulation. (Order at 11).

B. The plain language of Section 3006(e) requires that the EPA withdraw authorization of New Union's hazardous waste program.

While New Union's deficiencies cannot be disputed, this Court must address the more difficult question of whether the EPA's withdrawal of state authorization is required under RCRA. Though the EPA contends RCRA gives the agency considerable discretion concerning withdrawal decisions, this Court must first look to see "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. After examining the statute and case law, it is clear that Congress indeed addressed this issue, and that the EPA misconstrued its

discretion to determine whether state authorization is satisfied with its *duty* to withdraw authorization once a determination is made that the state does not meet this criteria. Because Congress gave the EPA no discretion concerning withdrawal decisions after a deficiency determination is made, the EPA must begin withdrawal proceedings against New Union under § 3006(e) of RCRA.

"The starting point for [the] interpretation of a statute is always its language." *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989). Concerning withdrawal, RCRA states that after the EPA determines a state program is not meeting authorization standards, the Administrator *shall* notify the state and give them opportunity to correct the deficiencies. 42 U.S.C. § 6926(e) (2010) (emphasis added). If no corrective action is taken, "the Administrator *shall* withdraw authorization of such program and establish a Federal program . . . ." *Id.* (emphasis added). The statute uses conditional language to mark where the EPA's discretion ends and statutory duties begin. Subsection (e)'s first clause implicitly recognizes the EPA's discretion to determine whether a state has properly administered and enforced an authorized program. *Id.* The language, "[w]henever the Administrator determines . . . ," shows Congress's intention to let the EPA, with its environmental expertise, assess the sufficiency of the technical standards necessary to maintain state authorization. *Id.*

However, the EPA's discretion ends with this first clause. The remaining language in subsection (e) switches gears, directing the Administrator to take specific action. As noted above, use of the word *shall* leaves little room for debate. *See supra*, Part I.C. Indeed, "[t]he word 'shall' is ordinarily [t]he language of command." *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947). Because RCRA "uses both 'may' and 'shall', the normal inference is that each is used in its usual sense - the one act being permissive, the other mandatory." *Id.* The agency has been

given discretion, but that discretion is limited to determining whether a state continues to meet authorization requirements. Once that determination is made, the discretion ends, and Congress mandates that authorization be withdrawn.

Fortunately, this argument does not rest on parsing statutory language alone, but also on sound jurisprudence. In *National Wildlife Federation v. EPA*, the D.C. Circuit held that the Safe Drinking Water Act gave the EPA no discretion to refuse withdrawing state authorization under that act.[1] 980 F.2d 765, 767-68 (D.C. Cir. 1992). Although the EPA amended its withdrawal regulation to state "the Administrator *may* initiate proceedings to withdraw program approval," and its preamble "to make clear that the Agency's decision to initiate withdrawal . . . is discretionary," these revisions did not overrule the statutory requirement that non-compliance triggered withdrawal. *Id.* at 769, 772. Giving the EPA discretion to determine whether a state program met approval *and* whether to withdraw approval if it did not, would strip the statute of its plain meaning and "would require nothing from the agency." *Id.* at 772. This power grab is precisely what the EPA is trying to do once again by refusing to initiate withdrawal proceedings against New Union. Under the EPA's interpretation of the statute, the agency wields unlimited power in the state-authorization field with no Congressional oversight. Congress did not intend nor codify such a delegation of power.

[1] The circuit court's description of the SDWA in *National Wildlife Federation* demonstrates the applicability of D.C. Court's analysis to the RCRA analysis before this Court. Under the SDWA, the EPA established safe water drinking standards, granted states primacy to implement their own programs, and then monitored compliance. 980 F.2d at 768. If a state no longer met the primacy criteria, the Administrator was to notify the state of its decision and, if not corrected, § 1413(b) of the SDWA required the Administrator to withdraw primacy. *Id.* The similarities in the analyses are obvious.

C. *Chaney*'s presumption is inapplicable because the Court must interpret a statutory provision, and Congress provided 'law to apply.'

This argument does not run counter to the policy considerations and principles announced in *Heckler v. Chaney*, limiting judicial review of agency non-enforcement decisions. 470 U.S. 821 (1985). First, while the policy considerations established in *Chaney* may weigh against judicially mandating New Union's withdrawal, the issue at hand primarily focuses on EPA's statutory duties and the interpretation of RCRA's withdrawal provision. As *National Wildlife Federation* pointed out, even in the context of a non-enforcement decision, "when a legal challenge focuses on an announcement of a substantive statutory interpretation, courts are emphatically qualified to decide whether an agency has acted outside the bounds of reason . . . ." 980 F.2d at 773 (quoting *Int'l Union United Auto., Aerospace, & Agric. Implement Workers v. Brock*, 783 F.2d 237, 245-46 (D.C. Cir. 1986)). Here, the agency has done just that.

Most critically, *Chaney*'s presumption does not apply because RCRA provides 'law to apply' that limits the EPA's discretion. "If [Congress] has indicated an intent to circumscribe agency enforcement discretion, and has provided meaningful standards for defining the limits of that discretion, there is 'law to apply' . . . and courts may require the agency to follow that law . . . ." *Chaney*, 470 U.S. at 834-35. Section 3006(e)'s use of mandatory language unmistakably shows where the EPA's discretion ends and its duty begins. Once it is determined a state program no longer meets authorization requirements, the EPA *must* withdraw authorization. Congress's intent could not be any clearer. Therefore, *Chaney*'s presumption does not apply.

VI. THE EPA MUST WITHDRAW AUTHORIZATION OF NEW UNION'S PROGRAM BECAUSE THE ERAA AMENDMENT TO THE RRA IS INCONSISTENT UNDER THE HAZARDOUS MATERIAL TRANSPORTATION ACT AND RCRA.

In 1975, Congress passed the Hazardous Materials Transportation Act ("HMTA") to regulate the transport of hazardous waste in intrastate, interstate, and foreign commerce. 49 U.S.C. § 5101 (2006). The EPA adopted the Department of Transportation's hazardous material regulations implementing the HMTA in order to satisfy their obligation under § 3003 of RCRA to govern the transport of hazardous waste. 42 U.S.C. § 6923 (2006). The ERAA's amendment to the RRA renders the law inconsistent with the HMTA, and the federal statute therefore preempts the state law. As such, New Union's program is inconsistent with the federal RCRA program, and the EPA should withdraw its authorization.

A. The ERAA is preempted by the HMTA because the statute is inconsistent under the second prong of the HMTA's preemption analysis.

In *Southern Pacific Transportation Co. v. Public Service Commission of Nevada*, the Ninth Circuit considered a preemption challenge to regulations of the Nevada Public Service Commission vesting the Commission with, among other things, permitting authority over the loading, unloading, transfer, and storage of hazardous material on railroad property. 909 F.2d 352, 354 (9th Cir. 1990). The court began its analysis by explaining that the HMTA's goal was to create a national, uniform scheme of hazardous material transportation to "replace a patchwork of state and federal laws and regulations . . . ." *Id.* at 353. To meet this goal, the HMTA expressly preempted state or local regulations inconsistent with the statute. *Id.* at 355. The statute defined "inconsistent" as situations where (1) compliance with the local regulations and the HMTA were impossible or (2) the local regulations were an obstacle to the accomplishment or execution of the HMTA. *Id.* According to the Ninth Circuit, the Nevada regulations fit this definition because they "create[d] a separate regulatory regime for these

activities, fostering confusion and frustrating Congress' goal of developing a uniform, national scheme of regulation." *Id.* at 358. The court also expressed concern over the Commission's presumed ability to arbitrarily approve or deny permits irrespective of federal regulations and the potential expense and delay that would accompany such discretion. *Id.* Therefore, the court found that the Nevada regulations violated the second leg of the HMTA's inconsistency analysis and were preempted by the federal statute. *Id.* at 359.

The amendment to the RRA raises the same concerns as the preempted regulations in *Southern Pacific* and likewise fails the second prong of the HMTA's inconsistency definition. By transferring permitting and inspection authority of railroad hazardous waste facilities from the state program to the Commission, New Union creates a duplicative burden on railroad hazardous material transporters, subjecting them to two regulatory regimes. As the D.C. Circuit pointed out, the HMTA was passed in order to consolidate precisely this type of regulation. *CSX Transp., Inc. v. Pub. Utils. Comm'n of Ohio*, 901 F.2d 497, 501 (D.C. Cir. 1990). The redundant burden of following both the HMTA's and the Commission's regulations will result in frustration, delay, and unnecessary expense for railroad transporters of hazardous waste. New Union's amendment to the RRA transferring this authority to the Commission is inconsistent with the HMTA and is therefore preempted by § 5125(a) of the HMTA. 49 U.S.C. § 5125(a) (2006).

B. The ERAA is inconsistent under RCRA because the program fails to meet the EPA's regulations.

Further, New Union's treatment of railroad hazardous waste facilities renders the state's program inconsistent with the EPA's own regulatory definitions that set RCRA's minimum standards. Governing transporters of hazardous waste, § 271.11 mandates that a state program *must* cover all transporters listed in § 263, including rail. 40 C.F.R. § 271.11 (2010). The ERAA

removed rail transporters from the oversight of the DEP (and thus New Union's hazardous waste program) and transferred that authority to the Commission. Therefore, New Union's program no longer sets standards for that class of transporters, directly contravening § 271.11. Next, the ERAA fails § 271.13 because state law and the DEP no longer govern permitting under the RRA, again vesting that authority in the Commission. State *law*, not a state agency, "*must* require permits for owners and operators of all hazardous waste management facilities . . . ." 40 C.F.R. § 271.13 (emphasis added). Shifting permitting authority to the Commission eliminates the political accountability inherent in a state law-permitting regime - a crucial consideration in environmental policy. Finally and most blatantly, New Union's RCRA program lacks the requisite enforcement authority under § 271.16. That section unequivocally states that any approved program *must* have criminal remedies available for violations of permit requirements. 40 C.F.R. § 271.16(a)(3) (2010). Yet the ERAA explicitly eliminated all criminal liability for facilities under the Commission violating environmental statutes (presumably state or federal). Once again, the ERAA puts New Union's hazardous waste program on unequal ground with the federal RCRA program.

According to Congress, a state program may differ from the federal model in that states may adopt *more stringent* requirements than those promulgated by the EPA. However, New Union's treatment of railroad hazardous waste facilities does precisely the opposite, completely removing them from the state's RCRA program. New Union's state program is plainly inconsistent with the federal RCRA program and must be withdrawn.

VII. NEW UNION'S TREATMENT OF POLLUTANT X IS PREEMPTED BY THE HMTA, FAILS RCRA'S CONSISTENCY DEFINITION, AND VIOLATES THE COMMERCE CLAUSE; THEREFORE, THE EPA MUST WITHDRAW ITS AUTHORIZATION OF NEW UNION'S PROGRAM.

A. New Union's amendment to the ERAA regarding Pollutant X is preempted by the HMTA.

Like the amendment to the RRA, New Union's amendment to the HRA prohibiting transporters of Pollutant X from stopping within the state is also preempted by the HMTA. Complying with this provision of the HRA presents obstacles to accomplishing the purpose of the HMTA - safety through uniform regulation of hazardous material transportation. For example, since one may only stop in New Union for emergencies or refueling, a transporter would have to construct routes around New Union in order to accommodate for meals, lodging, or periodic breaks. This rerouting could lead to longer routes and more time spent in transit.

As the Federal Railroad Administration pointed out, "the risk of releases of hazardous materials is reduced by minimizing the time such shipments spend in transportation. It would be poor policy to allow local governments to attempt to lower *their* risk by raising *everyone's* risk and by clogging the transportation system." Track Safety Standards, 63 Fed. Reg. 33,992, 33,999 (June 22, 1998) (emphasis added). In the context of the rail system, § 172.822 specifically prohibits a state law that limits use of a rail line for transporting hazardous materials. 49 C.F.R. § 172.822 (2010). In fact, the regulation warns that any such law is preempted. *Id.* It is clear that both the RRA and HRA amendments significantly infringe on the HMTA's ability to establish uniform regulations for hazardous waste transportation and are statutorily inconsistent under 49 U.S.C. § 5125(a). The amendments are preempted by the HMTA and render New Union's program inconsistent with the federal RCRA program.

B. New Union's treatment of Pollutant X is inconsistent with RCRA.

New Union's amendment concerning Pollutant X is inconsistent with § 271.4's regulatory definition of consistency, particularly subpart (a). Initially, it is worth noting that the EPA's consistency requirement could be interpreted as simply another characterization of RCRA's command that a state program be at least as stringent as, or equivalent to, the federal program. Rodgers, *supra*, at § 7:22. As discussed above, New Union's program has fallen well below these standards. More specifically, the provision of the HRA amendment prohibiting TSD permits for Pollutant X directly violates § 271.4(a)'s rule that no aspect of a state program may unreasonably restrict or impede the free movement of hazardous waste across the state border from or to other states. 40 C.F.R. § 271.4(a) (2010). This is precisely what New Union has done. On its face, the statute demonstrates New Union's goal to put all Pollutant X responsibilities on "facilit[ies] located outside of the state," regardless of a party's potential willingness to construct a facility in the state capable of Pollutant X treatment, disposal, or storage. (Order at 12). As the Supreme Court and other circuits have made clear, a state may not hoard its natural resources and place the burden of conserving the state's natural resources on out-of-state parties. *City of Phila. v. N.J.*, 437 U.S. 617, 627 (1978), *Envtl. Tech. Council v. Sierra Club*, 98 F.3d 774, 786 (4th Cir. 1996).

Additionally, the HRA amendment provision restricting transportation of Pollutant X through New Union likewise violates subsection (a)'s rule. Although New Union tries to conceal its intent behind permissive language ("[a]ny person may. . ."), the prohibitive effect of the provision is clear. (Order at 12). As explained above in the preemption context, this provision will require some transporters to avoid New Union because drivers invariably must stop for meals, lodging, and breaks. However, under New Union's amendment, these reasons

are impermissible. The New Union law operates as a restriction, impediment, and ban on the *free* movement of hazardous waste across its border, thus violating § 271.4(a).

C. New Union's treatment of Pollutant X violates the Commerce Clause.

The ERAA amendment prohibiting the importation or treatment of Pollutant X is unquestionably subject to Commerce Clause scrutiny. "It is well settled that actions are within the domain of the Commerce Clause if they burden interstate commerce or *impede its free flow*." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 31 (1937) (emphasis added), *see C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 391 (1994) ("[T]he article of commerce is not so much the solid waste itself, but rather the service of processing and disposing of it."). A more difficult question asks which well-established Commerce Clause analysis applies to the ERAA. Because the statute, in substance, discriminates against interstate commerce, it is subject to strict scrutiny. The statute fails this level of constitutional scrutiny.

The cleverly crafted ERAA amendment presents the precise opposite - though no less unconstitutional - discrimination invalidated in *C & A Carbone* and similar cases. In *Carbone*, the Supreme Court established that the Commerce Clause "presumes a national market free from local legislation that discriminates in favor of local interests." *Id.* at 393. Against this backdrop, the Court measured the town of Clarkstown's ordinance commanding local waste be deposited at a specific local facility. *Id*. at 386. Facing the same dilemma before this Court, Justice Kennedy explained that "[t]he real question" was whether the ordinance *per se* violated the Commerce Clause under *City of Philadelphia*, or whether the more lenient balancing test was appropriate under *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). *C & A Carbone*, 511 U.S. at 389.

Finding the ordinance *per se* unconstitutional, the Court looked past the ordinance's explicit terms and focused on the "practical effect and design" instead. *Id*. at 394. The practical

effect was plain - the ordinance barred importing a service and deprived competitors of access to local markets. *Id*. at 386, 392. Further, the ordinance was "no less discriminatory because in-state or in-town processors are also covered by the prohibition." *Id*. at 391. The Court's message was clear - the Commerce Clause invalidates local laws completely prohibiting interstate commerce. *Id*. at 390.

Just as the Supreme Court did in *Carbone*, this Court must examine the ERAA's "overall effect on local and interstate commerce." *Waste Sys. Corp. v. Cnty. of Marion*, 985 F.2d 1381, 1386 (8th Cir. 1993). Unlike the ordinance in *Carbone*, the ERAA states that all Pollutant X must be treated, stored, or disposed of somewhere - indeed, anywhere - *other* than New Union. Besides breaching the common-sense prohibition that a state "may not attach restrictions to exports or imports in order to control commerce in other [s]tates," *C & A Carbone*, 511 U.S. at 393, the ERAA violates the Commerce Clause in a much more fundamental way. Our Nation is one economic unit. *Cnty. of Marion*, 985 F.2d at 1388. As such, "one state may not 'isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade.'" *Gov't Suppliers Consolidating Servs., Inc. v. Bayh*, 975 F.2d 1267, 1277 (7th Cir. 1992) (quoting *City of Phila.*, 437 U.S. at 628).

This is precisely what New Union has done. Understandably, the state is concerned with the well-being of its citizens. But the courts have squarely rejected health, safety, and environmental justifications as sufficient to uphold a complete restriction on interstate commerce. *Cnty. of Marion*, 985 F.2d at 1388-89. The Pollutant X problem is not unique to New Union; it is shared by all. Only with coordinated interstate cooperation will the solution to this threat be achieved. Where the ordinances in *C & A Carbone* and *County of Marion* completely forbade the transport of waste *out of* those areas, New Union may no more

permissibly block the transport of waste *into* the state. As *City of Philadelphia* bluntly stated, "the clearest example of such [impermissible] legislation is a law that overtly blocks the flow of interstate commerce at a State's borders. 437 U.S. at 624. Because interstate commerce flows out of *and* into a state, the ERAA amendment is a *per se* violation of the Commerce Clause.

CONCLUSION

CARE petitioned the EPA to withdraw approval of New Union's hazardous waste program that was blatantly in violation of the EPA's approved state program. New Union's program should not continue to operate because the district court erred in denying CARE jurisdiction under RCRA § 7002(A)(2) and 28 U.S.C. § 1331. The EPA's failure to act on CARE's petition was a grant of authorization for New Union's program, reviewable under RCRA § 7006(b)(2).

The deficiencies in New Union's program are so egregious that the EPA must withdraw its approval because Congress has limited the agency's discretion, the ERAA amendments are inconsistent and preempted by the HMTA, and New Union's treatment of Pollutant X violates the Commerce Clause. For the foregoing reasons, CARE respectfully requests that this Court REVERSE the decision of the district court denying CARE's claims for lack of jurisdiction, lift the stay, and review the EPA's grant of authorization for New Union's program.

Respectfully Submitted,

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Counsel for CARE